William B. Allen, Allcon, Inc., and Allen Concrete, Inc. and Teamsters Local Union No. 984, affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 26-CA-9219

# 26 August 1983

## **DECISION AND ORDER**

# By Members Jenkins, Zimmerman, and Hunter

On 24 September 1982 Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, the Respondents filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified and stated in full below and hereby orders that the Respondents, William B. Allen, Allcon, Inc., and Allen Concrete, Inc., Memphis, Tennessee, their officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Informing employees that the business operations of any of the Respondents, or of any alter ego or successor to any of the Respondents, will be conducted on a nonunion basis; or that employees continuing in any such employ would be permitted to do so only on a nonunion basis.
- (b) Failing and refusing to adhere to and apply the terms and provisions of the collective-bargaining agreement made and entered into on 31 March 1980 for a period of 3 years, from 1 March 1980 to 1 March 1983, by and between Teamsters Local Union No. 984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Allen Materials Company; including, but not limited to, the provisions thereof requiring payment of health and welfare and pension benefits.
- (c) Failing or refusing to recognize and bargain collectively in good faith with the aforementioned Union as the exclusive bargaining representative of the employees in the following appropriate collective-bargaining unit:

All production and maintenance employees at Respondents' Memphis, Tennessee, facility (currently located at 7810 Moriarity Road, East Memphis, but also all other locations in or around Memphis, Tennessee, to which it may be removed or expanded), excluding all office and clerical employees, watchmen, guards, professional employees, technical employees, and supervisors as defined in the Act.

(d) Forming, creating, or utilizing any business enterprise, in corporate or other form, to which any property or goodwill in any form is transferred or shifted, or otherwise for the purpose of attempting to evade or avoid the Employer's obligations under the aforementioned collective-bargaining agreement, or to attempt to defeat, impair, or

<sup>&</sup>lt;sup>1</sup> The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondents except to the Administrative Law Judge's finding that they met the Board's jurisdictional standards. The record, however, indicates that during the 6 months of its existence Respondent Allcon, Inc., did approximately \$150,000 worth of business with Dick Corporation, which purchased more than \$50,000 worth of cement manufactured outside the State of Tennessee. Accordingly, we find that Respondent Allcon, Inc., met the Board's indirect inflow jurisdictional standards. See, e.g., Iron Workers Local 1 (Colt Construction), 245 NLRB 132 (1979). The record further establishes that Respondent Allen Concrete, Inc., purchased \$1,000 worth of cement manufactured outside the State of Tennessee per week and leased trucks for \$2,000 a month from outside the State. Projecting these figures on an annual basis, we find that Allen Concrete, Inc., satisfied the Board's direct inflow jurisdictional requirement

<sup>&</sup>lt;sup>2</sup> The Administrative Law Judge, in fn. 8 of his Decision, stated that the payroll records of "Dixie Ready-Mix Co." listed former supervisors of Allen Materials, Inc., Debtor-in-Possession, Martin, Dye, and Mize as holding rank-and-file jobs. The records, however, do not designate what jobs they held.

There is also no evidence to substantiate the Administrative Law Judge's statement that the business the partnership of William Allen, Earl Mize, and E. L. Dye did with Allen Concrete, Inc., involved "very substantial" amounts of money.

Further, the Administrative Law Judge, in fn. 10 of his Decision, erroneously stated that Allen's 26 June conversation with the truckdrivers occurred on or about 16 June and that the conversation violated Sec. 8(a)(3) rather than Sec. 8(a)(1).

<sup>&</sup>lt;sup>3</sup> In adopting the Administrative Law Judge's recommendation to issue a broad cease-and-desist order requiring the Respondents to cease and desist from violating the Act "in any other manner," we do not rely on his citation of NLRB v. Entwistle Mfg. Co., 120 F.2d 532 (4th Cir. 1941). Rather, we find a broad cease-and-desist order to be appropriate because the Respondents have a propensity to violate the Act. See Hickmott Foods, 242 NLRB 1357 (1979).

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Accordingly, we shall modify the Administrative Law Judge's recommended Order and notice to delete the provision adding interest to fund payments.

render burdensome the enjoyment and enforcement of the rights of said unit employees or their collective-bargaining representative thereunder.

- (e) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.
- 2. Take the following affirmative actions necessary to effectuate the policies of the Act:
- (a) Upon request, bargain in good faith with said Union as such exclusive bargaining representative, retroactively, as of the date when the Respondents or any of them ceased, failed, or refused to recognize or continue to recognize and bargain with said Union; and, if requested, embody in a signed agreement or agreements any understanding reached.
- (b) Apply the provisions, terms, and conditions of the collective-bargaining agreement effective 1 March 1980 through 1 March 1983, retroactively as aforesaid (except to the extent it may be duly modified by valid written agreement with said Union), and make whole all members of the aforesaid bargaining unit for all sums and benefits (including reimbursement for any medical or other expenditures incurred by reason of any discontinued premiums or payments) due thereunder, including but not limited to health and welfare and pension fund payments and contributions stipulated thereunder, computed in the manner described in the "Remedy" portion of the attached Decision.
- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all corporate and personal books, records, entries, and papers of whatever description, all payroll records, job records, social security payment records, timecards, personnel records and reports, accounts receivable records, checkbooks, checkstubs, bank statements, tax records, leases, deeds, bills of sale, and all other records, documents, and entries necessary or useful to determine any sums, payments, or benefits due under, and the extent of compliance with, the terms of this Order.
- (d) Post at their premises at 7810 Moriarity Road, East Memphis, Tennessee (as well as at any and all other premises in the Memphis and nearby area at or from which they may be doing business), copies of the attached notice marked "Appendix."

Copies of said notice, on forms provided by the Board's Regional Director for Region 26, shall, after being duly signed by the Respondents' authorized representatives, including William B. Allen, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

# **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

We accordingly assure you that:

WE WILL NOT tell you that we will operate only as a nonunion business, or that if you want to continue to work for us it can only be on a nonunion basis; nor will we so operate by our own say-so.

WE WILL NOT refuse to adhere to and apply the terms and provisions of the collective-bargaining agreement made and entered into on 31 March 1980 by and between Teamsters Local Union No. 984, affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Allen Materials Company; including, but not limited to, the provisions thereof requiring payment of health and welfare and pension benefits.

<sup>&</sup>lt;sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT withdraw recognition from or fail to recognize and bargain in good faith with Teamsters Local Union No. 984, affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as your exclusive collective-bargaining representative for the following appropriate collective-bargaining unit:

All production and maintenance employees at our Memphis, Tennessee, facility (currently located at 7810 Moriarity Road, East Memphis, but also all other locations to which it may be removed or expanded), excluding all office and clerical employees, watchmen, guards, professional employees, technical employees, and supervisors as defined by the Act.

WE WILL NOT form new companies or change names in order to avoid bargaining collectively with your Union or to get out of our collective agreement with your Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

WE WILL, upon request, bargain in good faith with your Union as your collective-bargaining representative, and, if requested, embody in a signed agreement or agreements any understanding reached.

WE WILL adhere and give effect to the 1 March 1980 through 1 March 1983 collective labor agreement with your Union, including the provisions regarding health and welfare and pension fund payments; WE WILL reimburse the Union to the extent of payments we have not made to those funds; and WE WILL make our employees whole for all sums and benefits due under that collective agreement (including vacation pay and medical and other expenditures incurred by our employees arising out of our failure to abide by the collective-bargaining agreement), plus interest.

WE WILL, upon request, bargain in good faith with your Union as your collective-bargaining representative.

WILLIAM B. ALLEN, ALLCON, INC., AND ALLEN CONCRETE, INC.

#### **DECISION**

# PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding¹ under the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (the Act), was litigated before me in Memphis, Tennessee, on May 20–21 and June 15–17, 1972, with all parties participating by counsel or other representative and afforded full opportunity to present evidence, contentions, proposed findings and conclusions, and briefs received by August 13, 1982. The record and briefs have been carefully considered.

The principal issues are whether the Respondent Employers, William B. Allen, Allcon, Inc., and Allen Concrete, Inc., 2 violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Charging Party Union, Teamsters Local Union No. 984. affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, under a subsisting collective agreement, discontinuing fringe and benefit payments required thereby, and refusing to abide by or honor the terms and provisions thereof; instead informing employees that it henceforth "would operate non-union" notwithstanding said collective agreement, and proceeding to do business under a succession of newly formed corporations with a variety of names; thereby also violating Section 8(a)(3) and (1) of the Act by discriminating against employees to discourage them from union membership and lawful concerted activities under the Act, and interfering with, restraining, and coercing them in their exercise of rights under Section 7 of the Act. A basic defense asserted by Respondent is that the corporation (Allen Materials, Inc.) named in the collective agreement in question is in the process of bankruptcy proceedings and that for that and related reasons the within proceeding is wholly barred.

Upon the entire record and my observations of the testimonial demeanor of the witnesses, I make the following:

# FINDINGS AND CONCLUSIONS

## I. JURISDICTION

At all material times, to on or about June 26, 1981, Allen Materials, Inc., Debtor-in-Possession, was a Tennessee corporation with its offices and place of business in Memphis, Tennessee, where it engaged in the business of manufacturing, selling, and distributing ready-mix con-

<sup>&</sup>lt;sup>1</sup> Charge filed by the Charging Party Union on July 23, amended on August 24 and December 8, 1981, and further amended on May 27, 1982; original complaint dated September 4, 1981; amended complaint dated December 15, 1981; further amended May 6, 1982; third amended complaint, undated, issued pursuant to a motion dated May 28, 1982, allowed by my order on notice, answered by Respondent by answer served on June 15, 1982. The third amended complaint supersedes the previous complaints.

<sup>&</sup>lt;sup>2</sup> William B. Allen and Allen Concrete, Inc., were added as Respondent by amendment of the complaint during the trial. The originial complaint named William B. Allen d/b/a Dixie Ready Mix as Respondent. Thereafter, the amended complaint named Alleon, Inc., as Respondent.

crete. During the 12-month period immediately prior thereto, in the course and conduct of its said business operations, it purchased and received at said location, directly in interstate commerce from places outside Tennessee, products valued in excess of \$50,000; and, during the same period, it also sold and shipped from its said Memphis location, directly in interstate commerce to places outside of Tennessee, products valued in excess of \$50,000.

Since on or about the same date of June 26, 1981, Respondent Allcon, Inc., also a Tennessee corporation with an office and place of business in Memphis, Tennessee, has been engaged in the business of manufacturing, selling, and delivering ready-mix concrete. Based on a projection of Respondent Allcon's operations since June 26, 1981, in the course and conduct thereof there will annually be purchased and received at said Memphis facility, directly in interstate commerce from places outside Tennessee, products valued in excess of \$50,000; and, during the same period, there will also be sold and shipped from said facility, directly in interstate commerce to places outside Tennessee, products valued in excess of \$50,000.

Since on or about April 13, 1982, Respondents have formed and conducted business as Allen Concrete, Inc., a Tennessee corporation with an office and place of business in Germantown (i.e., East Memphis), Tennessee, engaged in the business of manufacturing, selling, and delivering ready-mix concrete. Based upon a projection of the operations of that business since April 13, 1982, in the course and conduct thereof there will annually be purchased and received at said Germantown (East Memphis) facility, directly in interstate commerce from places outside Tennessee, products valued in excess of \$50,000; and, during the same period, there will be sold and shipped from said facility, directly in interstate commerce to places outside Tennessee, products valued in excess of \$50,000.3

I find that at all material times Respondents have been and are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that, at all of those times the Charging Party Union has been and is a labor organization as defined in Section 2(5) of the Act.

# II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Facts as Found

For many years, Respondent William B. Allen has been in the ready-mix concrete business.<sup>4</sup>

By 1978, however, due to a building recession, the business (then still known as Allen Materials, Inc.) had ebbed to the extent that in February 1978 it filed a petition for reorganization under Chapter XI of the Bankruptcy Act, resulting in Allen's being continued in possession to continue to conduct the entire business, with its existing employees, but eventually, by 1981, in a virtual disassembling and sale of various portions of its business. Thus, its data processing component was sole to one Jim Young, a former employee; some (only) of its trucks were sold to various individuals;5 and its large building materials inventory was also disposed of by sale. With regard to the underlying real property, held by S. G. Allen Company which commencing in July 1978 likewise underwent Chapter XI reorganization as S. G. Allen Company, Debtor-in-Possession, its various tracts or properties were sole or foreclosed under bank mortgage.6

One of these properties, consisting of the ready-mix concrete plant at 7810 Moriarity Road in East Memphis or Germantown (together with some office equipment), was purchased for \$60,000 by Allen himself (allegedly together with one Appleman, otherwise loosely identified), who then excuted a leaseback thereof to Allen Materials, Inc., Debtor in Possession, and later (according to Allen's testimony here) "sold" by Allen (and Appleman) for \$70,000 to one William Brown (also loosely identified, except as the alleged owner of a "Brown Trucking Company" or "Brown Trucking, Inc."— G.C. Exh. 7), who in turn, after acquiring title to the underlying real estate, executed a leaseback to a new corporation formed by Allen, i.e., Respondent Allcon, Inc.,7 at a monthly rental of \$1,500 with a purchase option for \$105,000 (G.C. Exh. 7). Allen has continued, in one form of name or another, and continues to operate the ready-mix concrete business at the same Moriarity Road location where he has in part continually conducted it for many years, since before the described bankruptcy proceeding, although the unprofitable portions of his former enterprise (Allen Materials, Inc.) have (seemingly largely due to the depressed condition of the building materials con-

<sup>&</sup>lt;sup>3</sup> The third amended complaint also alleges that the foregoing corporations constitute a string of related, *alter ego*, successor, or disguised continuation enterprises of which Respondent William B. Allen has been the principal and guiding star. These contentions are dealt with *infra*.

<sup>&</sup>lt;sup>4</sup> The saga of that business and related enterprises, as recounted by Allen, dates back to at least 1939 with the formation of Allen Ready-Mix (a proprietorship of the Allen family) and S. G. Allen Contractor (also a proprietorship, then his father's business). In 1951, Allen Ready-Mix acquired a sand and gravel operation, and in 1959 Allen Block Company was formed, initially as an Allen family proprietorship and thereafter taking corporate form. In 1960, the foregoing three enterprises were separately incorporated, leaving as an unincorporated proprietorship S. G. Allen (or S. G. Allen Company) (consisting of Allen, his mother, and his father) in ownership of the real property. In 1966, Allen started Allen Materials as an additional, separate building materials business. In 1972,

the three foregoing corporations were merged by Allen into Allen Materials, Inc., a new corporation. That corporation thus included not only a concrete-mix business but also a broad-scale building materials business, serving the building contracting and real estate industries, as well as individual building and home owners, and, due in part to a local building boom in Memphis during the 1970's, it prospered. At one point it even added to its ventures a data processing operation, access to which it subleased to various other unaffiliated local business enterprises.

<sup>&</sup>lt;sup>b</sup> Allen has since leased others under leases signed by him *personally* as well as in his capacity as a corporate officer (e.g., G.C. Exhs. 8, 9, and 10). Those trucks are being operated by employees of his same predecessor corporations.

<sup>6</sup> Although, according to the testimony here of Allen, unsecured as well as secured creditors received payment out of the \$54,000 raised on the sale of assets, the union (and thus, derivatively, the intended employee "beneficiaries" of the health and welfare and pension plans under the subsisting collective agreement) received nothing since the reorganization plan contained no provision for payment of obligations to the union pension fund, which by then stood at some \$70,000 to \$90,000.

<sup>7</sup> Initially to Allen's newly formed enterprise Dixie Ready-Mix Concrete, Inc. (G.C. Exhs. 5 and 6), which name, however, turned out to be unavailable. Allen also testified to an Allcon Ready-Mix adding, "I will be honest with you. I am not sure what the legal and corporate name was."

struction industry in Memphis) been abandoned, at least for the time being. Allen conceded at the trial that customers of Allen Materials, Inc., Debtor in Possession, were or are now still customers of Respondent Allcon, Inc., which (i.e., Allcon, Inc.) has been out of business since March 1982 because of nonpayment of a United States Government Internal Revenue Service lien. Thereupon, according to Allen, in April 1982 he formed Allen Concrete, Inc. (G.C. Exh. 16—N.B., same location, 7810 Moriarity Road, Memphis), to make and deliver ready-mix concrete and perform concrete work as Allcon, Inc., had done, retaining the latter's customers. None of these changes was discussed with the Union, nor has any been bargained about; and Respondents continued to refuse to do so.

According to Allen, at no time have there been any corporate books, minutes, officers, stockholders of Dixie Ready-Mix Concrete, Inc. (G.C. Exhs. 5 and 6), of Allcon, Inc. (G.C. Exh. 5), or of Allen Concrete, Inc. Allen concedes, however, that he continues to be the helmsman or "general manager" of Allen Concrete, Inc., as he was of all of its predecessors. Although he continues to utilize employees of his predecessor corporations, included in the unit designation of employees covered by the collective agreement in question, he claims his current company (Allen Concrete, Inc., at the time of the instant trial) maintains neither an employee list nor a payroll list nor even any W-4 or other federally required tax forms. He concedes that Allen Concrete, Inc., has had no employees other than those employed by its predecessors. And he has here supplied both a list of customers of Allcon, Inc. (G.C. Exh. 4), and of accounts receivable (G.C. Exh. 17)—conceding that his current customers were drawn from those lists, and that they were in turn customers of his precedessor companies. And Allen Concrete, Inc., has succeeded to and operates under the described leaseback arrangement with Brown Trucking, Inc. (G.C. Exh. 7) his employees in the last half of 1981 included drivers, a dispatcher, a batch plant operator, and bookkeeper-all of whom had been employed by the predecessor companies, and all other than the bookkeeper having been the unit employees categorized in and covered by the collective agreement in ques-

It is significant to note that, in the "transition" from Allen Materials, Inc., Debtor-in-Possession, to Allcon, Inc., through Allcon, Inc., to Allen Concrete, Inc., and to the present time, there is to be observed the following: the same principal, management, and supervision (i.e., Allen); the same business, in part; the same business location, in part; the same customers, in part; the same employees, in part;<sup>8</sup> the same equipment, in part; and the same office secretary. Thus, there is clearly indicated a continuity of ready-mix concrete operations, without hiatus, although on a scaled-down basis.

Allen and his witness, Earl Mize, also testified that Allen, Mize, and Dye are now "partners," under an al-

leged partnership agreement not produced, and which supposed partnership maintains no book account or checkbook but "splits" its income three ways in cash. According to Mize, this alleged partnership does business as Allen Construction, with "books" not produced here; and this alleged partnership buys for cash (involving very substantial amounts of money) its concrete from Allen Concrete, Inc. of which the owner is Allen, his "partner" in Allen Construction. When Mize so testified, Respondents' counsel asserted that he himself was just learning this from Mize's testimony here. Mize also testified that, at the same time, he continues to be employed by Respondent Allen Concrete, Inc.

On July 17, 1981, Allen wrote a letter to the Union on a letterhead of "Allen Building Materials Co., Inc." (G.C. Exh. 22.)

Since around the mid-1960's, Allen has had a succession of collective labor agreements with the Charging Party Union, recognizing the Union as the exclusive bargaining representative of certain of its employees. The latest of those agreements (G.C. Exh. 13), dated March 31, 1980 (with Allen Materials Company, Inc.—i.e., Allen Materials, Inc., as admitted by par. 21 of Respondent's answer to the third amended complaint), for a period of 3 years, from March 1, 1980, to March 1, 1983, covers a conventional unit of production and maintenance employees. Explicitly covering truckdrivers, mechanics, mechanics' helpers, mixing plant operators and assistants, warehousemen, and yardmen, it requires payment of wages at the stipulated union scales, it proscribes contrary wage arrangements with employees, it includes the usual provisions covering such subjects as hours of work, seniority, and fringe benefit, and its requires payments into union-administered health and welfare and pension funds. It contains a union dues-checkoff provision. It also provides (id. at p. 13, art. XXIX, sec. 1):

This Agreement shall be binding upon the parties hereto, their successors and assigns. In the event an entire operation is sold, transferring or taken over by sale, transfer, assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement during its term.

It is conceded that Allen Materials, Inc., Debtor-in-Possession, continued to operate under the agreement.

Jesse C. Sykes, a former ready-mix truckdriver for 14 years (1967-81) for Allen Materials, Inc., and Allen Materials, Inc., Debtor-in-Possession, Albert Wiggins, another such driver for the same companies for 18 or 19 years (1963-81), and M. D. Merriweather, still another such truckdriver for 24 years (1958-82), all union and bargaining unit members, testified credibly and without contradiction that on or around June 26, 1981, William B. Allen called a meeting of the seven company truckdrivers, with manager Richardson and dispatcher Martin there<sup>9</sup> in the company dispatch office, where Allen told

<sup>&</sup>lt;sup>8</sup> E.g., the payroll of Dixie Ready Mix Co. (i.e., Allcon. Inc.) for July-December 1981 includes three persons (Martin, Dye, and Mize) listed as holding jobs constituting rank-and-file unit jobs under the subsisting collective agreement. All three, however, had been supervisors of Allen Materials, Inc., Debtor-in-Possession.

<sup>&</sup>lt;sup>9</sup> Without explanation, neither Richardson nor Martin was called to controvert the testimony which follows; nor did Allen.

them that the Company was bankrupt; that the "company [is] going to be changed, and going to be up under another name . . . . [I don't] know exactly what name it [is] going to be under," but "it will be a non-union"; that he "needed five drivers to work for him if [you] want[ed] to," with the expectation that he would go to 10 trucks and 10 truckdrivers; that the drivers could "continue to work for [me] if [you] . . . want[ed] to, although [my] lawyer had advised [me] to terminate all of [you] . . . [get] rid of all [of you]," but the new company would be "nonunion," with "no pensions," but "seniority would stay as it was"; and that ["I am] going non-Union. [I don't] want no parts of the Union anymore." Wiggins and Merriweather continued to work for Allen in his new corporate forms, out of the same Moriarity Road location, until around early 1982, with, in some cases, the same trucks as before, their work being unchanged from before, under the same supervision, and at the same pay (but without health and welfare and pension benefits).

#### B. Discussion and Resolution

The General Counsel's contention is that, under the described circumstances, Respondents have violated Section 8(a)(5), (3), and (1) of the Act persistently through the series of new corporations formed.

That the circumstances described and found would, if not punctuated by the new corporations, constitute violations of the Act as alleged is not open to doubt. <sup>10</sup> The existence of a valid and subsisting 1980-83 collective agreement is unchallenged, as are its violation and the refusal of Respondents to adhere to or be bound thereby in any respect, leaving the sole basic remaining question to be whether they were so bound as *alter egos* or successors.

The Board and courts have described the requisites of an alter ego or of a successorship relationship sufficient to justify a carryover of the obligations under a collective labor agreement with a predecessor. Significant elements have been said to be whether the "new" business is substantially the same, in whole or in part; whether the "new" business has its own contract with another union; whether the product or services are the same; whether the location is the same; whether the same equipment is used; whether the customers are the same; whether the business name is the same or similar; whether there is a continuity of the work force; whether the jobs are substantially the same; whether supervision is the same; and whether there was a hiatus in operations.11 That a diminution in operations, as here, is consistent with a successorship, see NLRB v. Fabsteel Co. of Louisiana, 587 F.2d 689, 695 (5th Cir. 1979), cert. denied 442 U.S. 943:

The Board has long held, with court approval, that under proper circumstances, the obligation to bar-

gain with an incumbent union may be found although the work force is considerably diminished by the transfer.

As also stated in *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982), also a case involving attempted evasion of paying fringe benefits required under a collective agreement:

An alter ego relationship may exist when only a portion of an enterprise is purportedly transferred to a new owner. . . . .

. . . . .

Nor is the balance shifted by testimony that [Respondent] uses primarily asphalt, rather than concrete, and does a smaller percentage of its work on government contracts.

A "continuity of operation across the change in ownership"—even assuming, arguendo, that there has occurred a real change of ownership here—requires at least recognition of and bargaining with the incumbent union (John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)), whether or not the substantive obligations of the labor agreement continue to bind the successor (NLRB v. Burns Security Services, 406 U.S. 272 (1972)); but, where the "subsequent" employer is but a disguised continuation (albeit at a scale-down level, cf. Fabsteel, supra) or alter ego of the "predecessor" employer, even the substantive contractual obligations carry over (Crawford Door Sales Co., 226 NLRB 114 (1976)) and the "subsequent" employer may even be held accountable for the 'predecessor's" unfair labor practices, particularly if an alter ego thereof (Atlantic Paper Co., 121 NLRB 125 (1958)).

It would seem that the requisites of an alter ego or successorship relationship between Respondents and their nominal predecessor party to the subsisting collective agreement here—which Respondents continue totally to ignore and claim in no way effects their operations—are met in the instant case. Thus, as found above, William B. Allen continues to be the common strand, linchpin, principal, operator, and guiding star of the business, as well as each of the "enterprises," in question; and, although that business has, after its expansion, undergone a contraction to its earlier proportion, it continues to be a ready-mix concrete business, conducted in the same manner, at one of its same locations, under the same supervision, with the same unit employees and customers-although, to be sure, not as many. All of this has taken place without a hiatus in operations. Under these circumstances, it is clear that the subsisting collective agreement cannot simply be "shucked off," cast overboard, and ignored through the device of creating a succession of new corporations with somewhat different

In the ready-mix concrete supply business, the amount of business depends, of course, on the extent of customer calls for the concrete company's product. The need for concrete-mix truckdrivers therefore waxes and wanes with the number of ready-mix concrete orders to be de-

<sup>&</sup>lt;sup>10</sup> Indeed, the Board has in essence so held as to Sec. 8(a)(5) and (1) in the related case of *Allen Materials*, 252 NLRB 1116 (1980), which has neither been appealed nor enforced. That the undisputed statements of Allen to the truckdrivers on or about June 26, as testified to by Sykes, Wiggins, and Merriweather (*supra*), were also violative of Sec. 8(a)(3) is likewise not open to doubt.

likewise not open to doubt.

11 See, e.g., Johnson Ready Mix Co., 142 NLRB 437 (1963)

livered—as was the case also with Respondents' various "predecessors" including Allen Materials, Inc. The collective agreement here does not require that the employer employ a certain number of employees, but only that when employees in the categories included in the collective agreement are hired they be regarded as within the unit and thus subject to the provisions of that agreement. While Respondents are currently, at any rate for the time being, conducting a considerably scaled-down enterprise compared to Allen Materials, Inc. (which had included various nonunion operations in addition to the ready-mix concrete operation to which Respondents' activities may be limited; in this connection, however, cf. fn. 8, supra), it undeniably continues to conduct a ready-mix concrete supply and delivery business, arguably not trivial or inconsiderable, with employees clearly within the categories covered by the subsisting collective agreement of its predecessors Allen Materials, Inc., and Allen Materials, Inc., Debtor-in-Possession. As already indicated, mere dimunition in size of an operation—particularly where, as here, the number of employees contracts and expands dependent upon the need-does not free a successor (nor, of course, an alter ego) from the obligation of a subsisting labor agreement. Fabsteel, supra; Tanaka, supra. Here, with, of course, full knowledge of the subsisting collective agreement which he himself had negotiated and signed, Respondent Allen has, without a hiatus in operations, formed a succession of corporations under the same ownership, management, and, in part, location, employees, and customers as Allen Materials, Inc., and Allen Materials, Inc., Debtor-in-Possession, with the avowed purpose and intention, as credibly and without contradiction established by the testimony of a number of long-term employees, of operating "non-union" and thereby attempting to avade or avoid the obligations of the subsisting collective agreement and to refuse to bargain with the Union—the latter an obligation even in the absence of a collective agreement. Whether this succession of corporate creatures of Allen be dubbed "successors" or "alter egos" is of no real consequence here in assessing the continued viability of the collective agreement, and of Respondents' statutory obligation to bargain with the Union, with respect to the ready-mix concrete truckdrivers (and others of the bargaining unit) who continued in their employ without a hiatus.

If the originally named employer in the collective agreement had continued in business and had cut back its operations in the manner and to the extent and location here, it would unquestionably have continued to be bound, pro tanto, to its collective agreement with the Union. Thus, in regard to obligations under the collective agreement, Respondent are in essentially no different position than if Allen's original corporation had retrenched and reduced its operations to the point at which they now are, since there is no obligation under the collective agreement to employ a certain number or minimum number of employees, but only to utilize union members for such work as there may be to the extent covered by the collective agreement. Since such a retrenchment or reduction in the size of operations would not have in itself provided an escape from the obligations of the collective agreement, the mere fact that the re-

duced Allen business has changed names or has undergone a series of chameleonlike corporate metamorphoses has resulted in no greater or lesser obligation under the subsisting collective agreement. Spawning a succession of corporate children in rapid-fire fashion in order to slough off a collective-bargaining agreement (and the statutory bargaining obligation even absent such an agreement) may hardly be considered to promote that industrial peace designed by the framers of the Act, as is attested by their inclusion of Section 15 (infra) among its provisions. Cf., e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); J. M. Tanaka Construction v. NLRB. 675 F.2d 1029 (9th Cir. 1982); NLRB v. Cablevision Systems Development Co., 671 F.2d 737 (2d Cir. 1982); NLRB v. Fabsteel Co. of Louisiana, 587 F.2d 689 (5th Cir. 1979), cert. denied 442 U.S. 943; International Technical Products Corp., 249 NLRB 1301, 1303-34 (1980); P. A. Haynes. Inc., 226 NLRB 230 (1976); Johnson Ready Mix Co., 142 NLRB 437, 441-442.

As stated in Cablevision, supra at 739:

[T]he relevant comparison is not between Cablevision and Broadway on a total basis, but between the specific operations involving the union members. The "essential inquiry is whether operations, that impinge on union members, remain essentially the same after the transfer" to the new employer.

It remains only to consider the effect, if any, of the bankruptcy proceeding upon the instant proceeding.

Section 15 of the Act provides:

Wherever the application of the provisions of [U.S. bankruptcy statutes] conflicts with the application of the provisions of this [National Labor Relations] Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Although in its answer and in the initial stages of instant trial Respondents insistently maintained that this proceeding was stayed and of no effect by reason of the pendency of the aforedescribed bankruptcy proceeding of "Allen Materials, Inc." (supra), it is clear as a matter of law that this is not so, as explicitly provided by 11 U.S.C.A. § 362(b)(4).<sup>12</sup>

Where the principal of a bankrupt continues the business under a new name, even a

.... bankruptcy court's order allowing [him] to purchase ... assets free of all liens, claims, and encumbrances cannot affect the Board's Order .... To find otherwise would ... be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority ... to proceed against a successor-employ-

See also, e.g., NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981); SEC v. First Financial Group of Texas, 645 F.2d 429 (5th Cir. 1981); Commodity Futures Trading Commission v. Incomco, Inc., 649 F.2d 128 (2d Cir. 1981); In re Bel Air Chateau Hospital, 611 F.2d 1248 (9th Cir. 1979); In re D. M. Barker, Inc., 13 B.R. 962 (Bkrtcy, Tex. 1981).

er in furtherance of that obligation. [International Technical Products Corp., 249 NLRB at 1303.]

See also Golden State Bottling Co. v. NLRB, 414 U.S. 168; NLRB v. Baldwin Locomotive Works, 128 F.2d 39, 43-44 (3d Cir. 1942); NLRB v. Bachelder (receivership), 120 F.2d 574 (7th Cir. 1941), cert. denied 314 U.S. 647; Seeburg Corp., 259 NLRB 819 (1981); Burgmeyer Bros., 254 NLRB 1027, 1028 (1981); Allen Materials, 252 NLRB 1116; International Technical Products Corp., 249 NLRB 1301, 1303-04; P. A. Haynes, Inc. (assignment for benefit of creditors), 226 NLRB 230; Transmarine Navigation Corp., 170 NLRB 389 (1968), remanded 380 F.2d 933 (9th Cir. 1967). But cf. In re Bildisco, 682 F.2d 72 (3d Cir. 1982).

Whether or not Allen Materials, Inc. (or Allen Materials, Inc., Debtor-in-Possession), has or has not-and there is no evidence here that it has—been discharged in bankruptcy of its obligations under the collective agreement in question is a matter apart from the questions, here presented, of whether Respondent, as alter egos or successors, are, under the circumstances shown, bound thereby, and further, independently thereof, are under a statutory obligation under the Act-even in absence of any collective agreement-to bargain with the Union. In this connection, it is to be noted that the Board's final order in Allen Materials, 252 NLRB 1116, explicitly required respondent to cease and desist from refusing to bargain with the Union and from "repudiating or reneging" on collective agreements with the Union, as well as to make contributions and payments to the Union's health and welfare and pension funds (id. at 1123); and that that Order by its terms extends to that respondent's "officers, agents, successors, and assigns" (id. at 1116).

We are not here concerned with the enforcement of remediation <sup>13</sup> of the alleged unfair labor practices, but only as to whether they occurred. For the reasons indicated above, under the circumstances described, it is determined that they did in fact occur as alleged in the third amended complaint. The question of remediation thereof is one to be addressed in compliance or enforcement proceedings.

Finally, inclusion of William B. Allen as a Respondent, as well as within the compass of the remedial order, is warranted, since he continues to be the central thread of the necklace of corporate beads which he has created here. He concedes that he "personally exercise[s] all the functions of all the officials in the Respondent companies here." Cf., e.g., Concrete Mfg. Co., 262 NLRB 727 (1982); Carpet City Mechnical Co., 244 NLRB 1031, 1034 (1979); Henry I. Siegel Co., 172 NLRB 825, 838-840 (1968), enfd. 417 F.2d 1206 (6th Cir. 1969), cert. denied 398 U.S. 959 (1970). 14

It is accordingly found and determined that Respondents have, as alleged in the third amended complaint, violated and continue to violate Section 8(a)(5), (3), and (1) of the Act.

Upon the foregoing findings and the entire record, I state the following:

## CONCLUSIONS OF LAW

- 1. Jurisdiction is properly asserted in this proceeding.
- 2. Through announcing to employees on or about June 26, 1981, that thenceforth their operations would be non-union and employees could continue to work for them only on that basis, and in fact since that time continuing to operate on that basis, Respondents have interfered with, restrained, and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1), of the Act, and continue to do so, as alleged in paragraphs 13 and 21 of the third amended complaint.
- 3. Through refusing to make fringe and benefit payments to employees under a subsisting March 1, 1980-March 1, 1983, collective labor agreement with the Union, Respondents have discriminated and continue to discriminate against employees in regard to hire and tenure of employment and terms and conditions thereof to discourage membership in a labor organization, thereby violating Section 8(a)(3) of the National Labor Relations Act; and have further, interfered with, restrained, and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1), of the Act, and continued to do so, as alleged in paragraphs 14, 15, and 22 of same complaint
- 4. Through failure and refusal, since on or about July 10, 1981, to recognize or bargain collectively with the Charging Party Union as exclusive bargaining representative of employees in an appropriate bargaining unit, by repudiating and refusing to be bound by or adhere to the terms of the subsisting March 1, 1980-March 1, 1983, collective labor agreement with said Union, and through refusing since then to make fringe and benefits payments under the terms of said collective agreement, Respondents have failed and refused, and continued to fail and refuse, to bargain collectively with the representative of their employees in violation of Section 8(a)(5) of the Act, and have thereby further interfered with, restrained, and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1), of the Act, and continue to do so, as alleged in paragraphs 14, 20, and 23 of said complaint.

The appropriate bargaining unit referred to above is:

All production and maintenance employees at Respondent' Memphis, Tennessee, facility, excluding all office and clerical employees, watchmen, guards,

<sup>18</sup> Le., beyond issuance of a remedial order itself.

<sup>14</sup> Respondents also alleged by way of affirmative defense that this proceeding is time barred under Sec. 10(b) of the Act. That contention is unsound, since the cited section requires only that the alleged unfair labor practices not predate by more than 6 months the filing of a *charge—a* requirement clearly met here, particularly since the refusal to bargain is a continuing one. It is also well settled that a charge, or an original complaint, may be brought up to date and added so as to encompass additional matters uncovered by the Regional Director's investigation and the General Counsel's preparation for trial. See *NLRB v. Fant Milling Co.*,

<sup>360</sup> U.S. 301 (1959): National Licorice Co. v. NLRB, 309 U.S. 350, 367-369 (1940); NLRB v. Allis-Chalmers Corp., 563 F.2d 674, 676 (5th Cir. 1977); NLRB v. Jack LaLanne Management Corp., 539 F.2d 292, 294-295 (2d Cir. 1976); NLRB v. Braswell Motor Freight Lines, 486 F.2d 743, 746 (7th Cir. 1973); Texas Industries v. NLRB, 336 F.2d 128, 132 (5th Cir. 1964); NLRB v. Kohler Co., 220 F.2d 3, 6-8 (7th Cir. 1955); Wayne Electric, 226 NLRB 409, 415-416 (1976); North Country Motors, 133 NLRB 1479 (1961); Dal-Tex Optical Co., 130 NLRB 1313 (1961). Respondents' said affirmative defense is accordingly dismissed.

and professional employees, technical employees, and supervisors as defined in the Act.

5. The foregoing unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Respondent having violated the Act in the respects described should be required to cease and desist from those or further violations, and, in view of the seriousness of the violations, going to the "very heart" of the Act's purposes and its cornerstone guarantee, by absolutely refusing to have any dealings with the employees' bargaining representative as well as the noncompliance with a former Order of the Board in a previous proceeding against Allen Materials, Inc., Debtor-in-Possession (supra), should also be required to cease and desist from in any way violating employees' rights under the Act. 16

Respondent should also be required to recompense the Charging Party Union by making the fringe and pension payments required by the subsisting 1980-83 collective agreement with regard to the union unit members who have worked, are working, or will work thereunder, and to observe and give effect to the other terms and provisions thereof. In view of the staccato formation of corporations and other enterprises by Respondent William B. Allen, he should also be required to cease and desist from continuing to form such enterprises for the purpose of attempting to evade and escape from the obligations of the aforementioned collective agreement or attempting to avoid and escape from the statutory bargaining under the Act.<sup>17</sup>

Sums due, with interest, should be calculated as explicated by the Board in F. W. Woolworth Co., 90 NLRB 289 (1950), Isis Plumbing Co., 138 NLRB 716 (1962), and Florida Steel Corp., 231 NLRB 651 (1977).

Finally, the usual informational notice should be required to be posted.

[Recommended Order omitted from publication.]

<sup>16</sup> A. J. Krajewski Mfg. Co., 180 NLRB 1071 (1970).

<sup>&</sup>lt;sup>16</sup> Cf., e.g., NLRB v. Entwistle Mfg. Co., 120 F.2d 532, 536 (4th Cir. 1941).

<sup>&</sup>lt;sup>17</sup> For a more complete exposition of the rationale for and cases supporting the inclusion of William B. Allen in the remedy here, see sec. B, par. 14, supra.